



Overarching Thoughts and Actions

- Return employees to the workplace in accordance with laws and current guidance (both in terms of timing and process)**
 - » Follow Centers for Disease Control and Prevention (“CDC”) guidance
 - » Comply with applicable state/county/city schedules/guidance—being mindful that rules often differ by jurisdiction
 - » Follow additional guidance propounded by the [Occupational Safety and Health Administration](#) (“OSHA”) and other applicable agencies
 - » Be aware of and review industry-specific guidance for retail workers issued by OSHA and other applicable agencies
 - » Consider industry group and/or third-party guidance (e.g., National Retail Federation) for recent developments
- Create a Return-to-Work Management Team, with applicable representatives from HR, IT, Legal, Security, Office Management, etc., to coordinate and oversee various aspects of a return to the workplace**
 - » Identify who will oversee each aspect of the transition process (e.g., ergonomics and space design, cybersecurity, and selection of returning employees, including how many, which ones, required documentation, processes/testing for entering the workplace)
 - » Ensure coordination among team members
 - » Coordinate employee communications regarding workplace protocols and safety measures (e.g., notifying an employee when a co-worker with whom the employee has had close contact has tested positive for COVID-19—and be sure to maintain privacy/confidentiality rules, as appropriate)
 - » Select and communicate a contact person or e-mail address to accept employee questions and concerns regarding workplace protocols and safety measures
 - » Prepare protocols for potential employee actions:
 1. “Sick-outs” or other demonstrations/protests in public locations outside the retail establishment
 2. Refusal to leave the workplace after exhibiting symptoms
 3. Refusal to comply with protocols and rules (including mask wearing)
- Expect a staggered return to the workplace, as opposed to all employees returning at once**
 - » Identify objective factors for identifying the order in which departments and employees will return to the workplace
 - » Keep pay equity concerns in mind
 - » Prepare scripts for recalling workers, with anticipated responses for those with concerns regarding returning to the workplace (e.g., childcare / family care responsibilities, vulnerable characteristics of the employee or a household member, lack of vaccine)
- Determine which functions absolutely must be performed within the retail location**
 - » Analyze and document job functions that have not successfully been performed from home during shelter-in-place orders for use in determining which employees/jobs must return to the workplace
 - » Consider partial returns for employees/job functions that can be performed partially from home
- Consider assessing employees’ desire to return to the workplace versus mandating all employees to return**
- Determine whether jobs should be reconfigured such that certain job functions requiring an “in store” presence may be separated from existing responsibilities and reconstituted as new, separate jobs**
- Consider any union/collective bargaining agreement (“CBA”) issues (addressed in greater detail below)**
- Consider whether a board of directors must be involved/provide approval**
- Ensure consistency in implementing return-to-work procedures**
 - » Organization-wide, where appropriate
 - » By jurisdiction, since return-to-work timing and protocols often differ by location (state, county, city, municipality)
 - » By job function (certain jobs will require in-person presence, and some will not)

Consider data security and worker privacy matters

- » Ensure that any documents created will not violate applicable international and/or U.S. data security laws
- » Ensure the maintenance of worker privacy rules (including those around health and medical information)
 1. Under the Americans with Disabilities Act (“ADA”)
 2. Under the Health Insurance Portability and Accountability Act (“HIPAA”)
 3. In light of laws relating to the use of biometrics, carefully consider the use facial recognition software, or wristwatches or mobile apps that track employees’ locations or check their temperatures
- » Consider providing cybersecurity training to remote and in-person employees

Consider training the workforce on de-escalation techniques to deal with customers refusing to comply with the store’s health and safety protocols.

Remind employees that, unless expressly stated, all company policies and procedures continue to apply (e.g., social media policy)



Testing for Entry/Access

Temperature

- » Per the [Equal Employment Opportunity Commission](#) (“EEOC”), temperature taking is permissible
- » Time spent taking temperatures may be compensable
- » Note that many infected with COVID-19 do not exhibit symptoms, so it is unclear how effective temperature taking will be

COVID-19 testing

- » Per [EEOC](#), testing is permissible
- » Availability of sufficient testing is dubious
- » Only provides results for the day of the test (assuming results are immediately available)
- » Antibody testing is not permissible

Other testing concerns

- » Consistent enforcement of rules regarding sending sick employees home
- » Ensure safe testing processes/procedures
- » Confidentiality
- » Data security
- » Protocols for handling employees who refuse to submit to testing



Vaccination

Develop a vaccine policy that addresses an approach to COVID-19 vaccine efforts for the workforce, which may include the following considerations:

- » Evaluating the proper approach (e.g., mandatory, optional, or encouraged) and addressing common questions
 1. Should proof of vaccination be required?
 2. Who should administer the vaccine?
 3. What proof should be required?
 4. What incentives should be offered?
 5. How should employees who refuse vaccination (for disability/religious reasons v. other reasons) be addressed?
- » Analyzing the implications of strategy for employee morale or other challenges
- » Determining whether vaccine policy requires bargaining/negotiation with the employees’ collective bargaining representatives
- » Assessing recording keeping implications, as well as privacy and security concerns
- » Creating applicable consent forms, acknowledgements, or educational materials
- » Training and educating employees, including supervisors, on vaccine policy, proper record keeping, and any additional requirements
- » Reviewing applicable requirements imposed by state or locality (i.e., paid time off to procure vaccine and or recover)
- » Contemplating the legal risks of obtaining health information from employees or customers

- For mandatory policies, ensure legal compliance with applicable grounds for refusal (i.e., reasonable accommodations for individuals with sincerely held religious beliefs or because of a disability)**
- For optional or encouraged policies, consider whether incentives such as one-time bonus, time off to procure a vaccine, or any other benefit complies with applicable wage and hour laws**
- When considering the use of vaccination passports for your workforce or customers, ensure compliance with applicable federal, state, and local laws (e.g., some states are banning the use of vaccination passports in certain circumstances)**



Returning to Work Following Illness or Exposure of Employee

- Follow CDC and state/local [guidance](#) regarding quarantine**
 - » Consider mandatory quarantine periods by state and whether such time periods change based on:
 1. Vaccination status
 2. Positive test vs. exposure
 3. Prior COVID-19 positive status
 4. Receipt of negative test result
 5. Reduction of symptoms
 - » Take temperatures and assess symptoms prior to starting work
 - » Send home employees who get sick during the day
 - » Require face masks
 - » Increase air exchange in the building
 - » Increase the cleaning of frequently touched surfaces
 - » Practice social distancing at work
- Require “fitness for duty” certifications?**
 - » Doctors do not have time/resources to provide
 - » EEOC and CDC do not recommend



General Workplace Safety Concerns

- Commuting**
 - » Consider providing/encouraging alternative methods other than public transportation
 1. Will such methods be reimbursable?
 2. Is this feasible?
 3. Ensure consistency
 - » Consider basing return-to-work protocols on the safety of employees' commuting requirements (e.g., driving, walking, being required to utilize public transportation)
- Safe workplace—legal obligations and best practices**
 - » Masks
 1. Will masks be employer-provided/branded?
 2. If employees are permitted to bring their own, consider specific requirements (e.g., logos/brands, cloth vs. disposable)
 3. Ensure that extra masks are available for employees and customers who do not have one (*See **Managing Employee Interactions with Customers** section for more details*)
 - » Temperature monitoring
 1. Consider measuring temperatures of employees prior to entering the workplace
 2. Consider measuring temperatures of customers
 3. Assure consistent enforcement
 - a. Consistently ensure that employees/customers who have a fever are not permitted to enter
 - b. Ensure consistent application of rules
 - c. Ensure safe implementation of temperature taking

- » Social distancing (six feet between employees or customers)
- » Discouraging hand-shaking and other unnecessary physical contact among employees or with customers
- » Modifying employee work stations
 1. Consider screens/partitions/plexiglass between employee stations or registers
 2. Consider reorienting seating configurations (so that employees do not face others) or work zone limitations
- » Making handwashing/hand sanitizers/tissues available to employees
- » Cleaning the workplace
 1. Disinfecting (using FDA-approved disinfectants)
 2. Increased frequency of cleaning
 3. Cleaning common areas (elevator buttons, cafeterias, doorknobs)
 4. Confirm with landlords/building management that their own cleaning protocols are sufficient, if applicable
- » Ventilation
 1. Increase air flow
 2. Incorporate outside air (where possible, open windows)
- » Having only required “in person” work be performed at the workplace (employees remain home the other days/times)
- » Reconfiguring the workplace
 1. Changing capacity and/or setup (in compliance with state/local occupancy limits)
 2. Discouraging employees from using cafeterias, or spreading out tables/counter space
 3. Creating barriers, where possible
 4. Marking floors or other spaces to identify six feet of distancing
 5. Predetermining employee/customer flow throughout the workplace—e.g., designating entrances/exits/hallways/aisles/corridors as one way, where feasible
 6. Elevators—limit capacity; designate/limit button pressers, where possible
- » Limiting access to community equipment
 1. Workplace equipment (contactless point of sale, cash registers, merchandise, computers/keyboards, printers/copiers, warehouse equipment, etc.)
 2. Kitchen (coffee machines, refrigerators, sinks, microwaves, etc.)
- » Food/cafeterias
 1. Consider use of individual meals vs. buffet style offerings
 2. Consider offering lunches so that employees will not need to leave the premises once they have arrived
 3. Limit access to cafeterias and/or stagger hours to different groups of employees to ensure capacity limits
- » Other facilities
 1. Ensure that fitness centers, lactation rooms, changing rooms, and other similar facilities are cleaned frequently and schedules are established to ensure appropriate occupancy levels
- » Incorporating signage, e.g., reminding employees to wash hands, to not use community equipment, to stay home if sick, of occupancy restrictions
- » Installing no-touch equipment, where possible (e.g., sinks in bathrooms, elevators, doors)

Managing employee interactions with customers and reducing workplace violence

- » Review CDC guidance for Retail and Services Business on [Limiting Workplace Violence Associated with COVID-19](#)
- » Consider drafting or updating a workplace violence policy
- » Consider designating an individual or team responsible for addressing customer relations
- » Consider implementing a policy for investigating, documenting, remediating issues with customers while preserving confidentiality to the greatest extent possible under the circumstances
- » Consider using technology, such as panic buttons, to help address potentially threatening or violent situations
- » Communicate and train employees (including specific manager and supervisor training) on workplace violence policies
- » Consider providing mental health and other resources to help alleviate or deal with stress
- » Consider the following tips for helping employees deal with mask-averse customers:
 1. Making your mask policy loud and clear both in the workplace and on the company’s website or social media platforms (and particularly prevalent at all points on entry)
 2. Having a designated/trained mask enforcer
 3. Offering alternative solutions (e.g., offering to provide a mask, or bringing items to the customer through curbside pickup)
 4. Documenting the incident via video recording
 5. Developing a clear chain of command to escalate incidents as conditions warrant

Consider banning or severely restricting travel, especially nonessential travel



Scheduling and Training Considerations

- Consider whether split shifts / staggered hours of work might be appropriate**
 - » Avoids crowds at the workplace
 - » Allows for commuting at off-hours, and therefore safer commutes
- Team A/Team B concept**
 - » Consider whether staggering employees' workplace time should be split
 1. One week on, one week off
 2. M-W-F versus T/Th
 - » Split up teams amongst different locations/facilities so that if employees are impacted by COVID-19, the entire group will not be impacted
- Consider cross-training employees such that more employees are able to handle various functions if one or more employees becomes unavailable**



Workplace Accommodations

- Consider EEOC [guidance](#) (in particular, Section "D" on workplace accommodation)**
- Note that underlying mental conditions may be exacerbated by COVID-19 and that employees may have an increased need for a workplace accommodation**
- Be advised that an "undue hardship" analysis may have changed due to COVID-19 safety protocols**
- Telework may be deemed a reasonable accommodation where such working was successful in the recent past**
- Be aware that employers must engage in the interactive process, even if a requested accommodation will be denied**



Leaves of Absence

- Where employees must return to the workplace, be prepared to see an increased request for leaves due to childcare / family care responsibilities, children at home due to closed schools/day care**
- Be familiar with reasons for sick time under the Families First Coronavirus Response Act ("FFCRA") (if opting in for voluntary coverage in 2021)**
- Be aware of revised sick time rules in states/cities with existing sick time laws**
- Be aware of additional sick time availability due to new state/county/city laws (e.g., New York, California)**
- Ensure that all applicable paperwork and information is gathered when employees request leave and return to the office**
- Prepare protocols for employees who refuse to (or prefer not to) come to the workplace due to fear of contracting COVID-19 or falling within a vulnerable group (e.g., age, underlying condition, etc.) or having a vulnerable individual in their household**



Teleworking Considerations

- Determine whether to allow employees to continue to telework (work remotely)**
 - » Consider which positions continue to be appropriate for telework
 1. For what reason(s)?
 2. For how much longer?
 - » Determine whether specific aspects of an employee's job requires in-office work. If so, document these facts, and consider:
 1. Whether these responsibilities should be performed by someone else
 2. Whether these responsibilities should be carved out of the individual's current role and formulated into an alternative position

- Consider whether telework can be a reasonable accommodation for employees with disabilities or individuals in vulnerable/high-risk populations**
- Appropriately manage availability, productivity, and corresponding expectations**
- If contemplating productivity software (e.g., spyware/surveillance/keystroke logging), consider legal implications:**
 - » Potential claims under the Electronic Communications Privacy Act (including Federal Wiretap Act and Stored Communications Act), state and local social media password protection laws, state consumer protection laws (e.g., California Consumer Protection Act), and similar privacy laws
 - » Be sure to effectively communicate what will be monitored and how



Policies/Procedures

- Assess and review existing policies and procedures, or add some or all of the following:**
 - » Remote work
 1. Including logistics, timekeeping, confidentiality of employer information
 - » Sick time—consider whether such policies reflect new state/local guidance and/or include a reference to COVID-19-specific sick leave laws (some are in addition to existing time off)
 - » Leaves of absence (e.g., for employee’s own illness, for family members’ illness, family leaves, personal leaves, sabbaticals)
 - » Vacation/paid time off
 1. Consider revising accrual, carryover rules
 - a. So that unused time will not expire
 - b. Because employees have been unable to travel
 - c. To require use in a given year (even absent travel)
 2. Consider whether additional time is warranted
 - » Travel/expense reimbursement
 1. Limiting business travel to essential travel
 - a. Establish protocols to determine the “essential” nature of proposed business travel
 2. Consider requiring employer notification of personal travel in connection with quarantine rules
 3. Restricting conferences, entertaining
 - a. Consider limiting the number of employees who may attend a particular conference/meeting so as to limit potential exposure to COVID-19
 4. Modifying T&E rules/allowances
 - » Cybersecurity/confidentiality
 - » Outside employment (in case employees are brought back on a reduced basis, and seek to supplement their income by obtaining part-time work elsewhere)
- Determine whether bonus, commission, or other compensation plans should be revised in light of changes to the business**
 - » Stay up to date on state or local laws/ordinances requiring bonuses or increased pay for frontline workers (often referred to as “hero pay”)



Unemployment Insurance and Work-Sharing Options

- Consider whether work-sharing programs, or short-time compensation programs, make sense for your workforce (under these programs, employers with reduced available work reduce the working hours of groups of employees, and their reduced hours are supplemented by unemployment insurance benefits; work schedules are generally reduced 20-60 percent)**
- Consider the impact of refusal to work on unemployment insurance eligibility**
- Ensure appropriate unemployment insurance notices are provided upon reduction of hours or termination of employment**



Hiring New Employees

- Consider virtual interviewing options (e.g., telephone or video) in compliance with state laws**
- Utilize digital onboarding documents**
 - » Be aware of [temporary rules](#) for Form I-9 compliance and E-Verify
- Consider alternative options for background checking and fingerprinting where same are not readily/quickly available**
- Consider reserving flexibility on start date due to business need, delayed onboarding processes, etc.**
- Consider vaccination policy**
 - » Will employer incentivize, mandate, or encourage new hires to obtain a vaccine?



Wage/Hour Matters

- Review exemption designations**
 - » Due to changes in duties
 - » Due to changes in hours worked
 - » Due to changes in compensation (e.g., below salary basis thresholds)
- Possible notice requirements if compensation has decreased or basis for compensation has changed (e.g., commission structure)**
- Be advised of call-in pay concerns if employees are sent home (e.g., due to illness, refusal to allow temperature checks)**
- Assess whether time taken for temperature checks is compensable**
- Ensure proper expense reimbursement in respect of requests pertaining to equipment and supplies purchased during periods of remote work**
- Comply with state or local laws/ordinances requiring bonuses or increased pay for frontline workers (often referred to as “hero pay”)**
- Ensure vaccine strategy considers wage and hour issues (i.e., monetary incentives for vaccination or time off to procure a vaccine)**



Bases for Liability

- OSHA**
 - » General Duty Clause (or Emergency Temporary Standards, if issued by OSHA, which may take precedence)
- Discrimination (concepts)**
 - » Potential claims based on selection for termination/furlough
 - » Potential claims based on selection for return to work
 - » Potential claims if employers rely on “vulnerability” factors (age, underlying conditions such as diabetes, immune-compromised condition) or vaccination status to determine who should return to work

Discrimination (specific claims)

- » The Age Discrimination in Employment Act
 1. Selecting employees for furlough/termination based on age
 2. Only permitting younger employees to return to work
- » Title VII/state/local antidiscrimination laws
 1. National origin (e.g., Asian)
 2. Pregnancy
 3. Familial/caregiving status
 4. Any other protected category
- » ADA/state/local disability discrimination laws
 1. Only allowing “healthy” or vaccinated people to return (without accommodation)
 2. Perceived disability
 3. Associational disability
 4. Mental as well as physical disability

Retaliation

- » Workers’ compensation retaliation
 1. Retaliation for having made a workers’ comp claim
- » FMLA retaliation
 1. Retaliation for having taken an FMLA leave
 2. Retaliation for having taken extended FMLA leave under the FFCRA (during 2020 or with the voluntary opt-in for 2021)
- » Fair Labor Standards Act
 1. Retaliation for having used FFCRA sick leave (during 2020 or with the voluntary opt-in for 2021)
 2. Retaliation for having complained about wage/hour concerns
- » OSHA
 1. Retaliation for having raised workplace safety or other concerns

Fair Labor Standards Act/State Wage & Hour Laws

- » Screening procedures that are more than de minimis time
- » State/local wage issues, such as call-in pay or sick pay

National Labor Relations Act

- » Having engaged in protected concerted activity (e.g., complaining about lack of personal protective equipment or other safety equipment/practices, or having requested hazard pay)

Worker Adjustment and Retraining Notification (“WARN”) Act

- » Future layoffs may not be eligible for “unforeseen business circumstances” exception
- » Short-term furloughs lasting longer than six months may eventually implicate the WARN Act

COVID-19-specific law, order, or regulation



Union Issues

- CBAs generally govern recall from layoff, usually by seniority, but may include exceptions by job classification, skill, expertise**
- Certain unilateral changes to policies/procedures will not be permitted without negotiation with the union**
 - » Memorialize temporary and non-precedential policies/procedures for recall in a memorandum of agreement
 - » Consider whether altered conditions are subject to mandatory bargaining, including vaccination strategy and screening procedures



Benefits Concerns

- If benefits were lost/discontinued due to a layoff/furlough, eligibility based on service, reinstatement of benefits, waiting periods (including potential waiver of waiting periods) may apply**
- If benefits continued during a layoff/furlough, potential employee “catch-up” payments are needed (if employer paid employee premiums)**
- Review recordkeeping issues and reporting issues (e.g., proper classification of returning employees for Affordable Care Act employer mandate reporting, retirement plan (e.g., vesting) purposes, and deferred compensation plans subject to Internal Revenue Code Section 409A)**
- Remind returning employees to:**
 - » Review changes made to certain benefits, such as dependent care flexible spending accounts or commuter/parking benefits
 - » Resume employer contributions to retirement plans (if suspended)
- Review impact of adjustments to compensation on benefit contributions and eligibility**
 - » If employees are returning at reduced hours, different eligibility rules may apply
- Consider whether employees returning to work during an ongoing severance period may require returning or ceasing severance benefits**
- Consider COBRA and other leave benefits for former employees being rehired**
- Consider benefit design changes:**
 - » Adopting/expanding telehealth benefits (to maintain social distancing)
 - » Adopting/expanding the Employee Assistance Program (to assist employees with stresses and challenges related to return to work)
 - » Providing COVID-19 diagnosis and testing (and keeping it an “excepted benefit”) and/or similar services through a group health plan or wellness programs
 - » Adopting/expanding backup day-care benefits (if schools remain closed) or other creative day-care alternatives
- Consider whether any COBRA subsidies are required to be paid pursuant to the American Rescue Plan Act of 2021**
 - » Ensure appropriate notices are sent to employees whose employment terminated or will terminate prior to September 30, 2021